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# VIRGINIA LAW REVIEW

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## THE CONSTITUTIONALITY OF SEGREGATION ORDINANCES.\*

THE question of the constitutionality of city ordinances providing for the separation of the white and colored races in residential sections has finally been passed upon by the Supreme Court of the United States, in the case of *Buchanan v. Warley*, decided November 5, 1917.

The case originally reached the Supreme Court for the October Term, 1916. It was argued before seven judges, Mr. Justice Day being sick, and the vacancy caused by the death of Mr. Justice Lamar not having been filled. After the argument in April, 1916, the Court ordered the case reargued before a full bench. Between the first and second argument, Mr. Justice Hughes resigned, Mr. Justice Brandeis and Mr. Justice Clark were appointed to the bench, and Mr. Justice Day was back in his seat at the reargument. Of the nine judges who heard and decided the case, two are from Massachusetts, two from Ohio, one from Wyoming, one from California, one from New Jersey, one from Louisiana and one from Tennessee.

The case was apparently one made up for the purpose of get-

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\*EDITORIAL NOTE: The author of this article is City Solicitor of Baltimore, where the first case involving the question arose. He has been prominently identified with the question from the very beginning, and filed a brief as *amicus curiae* before the Supreme Court in the case recently decided.

For a review of the decisions of the State supreme courts in the first five cases involving the question and a collection of editorial discussions of it, see 3 VA. LAW REV. 304. See also 1 VA. LAW REV. 333; 2 VA. LAW REV. 82.

ting the question tested. It was a suit for the specific performance of a contract for the sale of a house, which contained the following clause:

"It is understood that I am purchasing the above property for the purpose of having erected thereon a house which I propose to make my residence, and it is a distinct part of this agreement that I shall not be required to accept a deed to the above property or to pay for said property unless I have the right under the laws of the State of Kentucky and the city of Louisville to occupy said property as a residence."

The suit was brought by Buchanan, a white man, against Warley, a negro, who set up as a defense the ordinance of the City of Louisville which undertook to prohibit a colored person from moving into a block where a majority of the residents were white, and to prohibit a white person from moving into a block where a majority of the residents were colored. The Court held that the ordinance is unconstitutional.

The decision is based entirely upon the right of Buchanan to sell his property to a negro if the negro would give him more for it than a white man would give, or if, for spite or any other reason, he preferred to sell it to a negro. This clearly appears from the following extracts from the opinion:

"The Fourteenth Amendment protects life, liberty, and property from invasion by the states without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. *Holden v. Hardy*, 169 U. S. 366, 391. Property consists of the free use, enjoyment and disposal of a person's acquisitions without control or diminution save by the law of the land."

"The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person."

"We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate

exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law. That being the case, the ordinance cannot stand."

Considered from the standpoint of the property right, the opinion does not suggest how the right to sell a house is taken away or affected by forbidding its use as a residence for colored people any more than by forbidding its use for "livery stables, brickyards, and the like,"<sup>1</sup> or by forbidding its use for a garage.<sup>2</sup> It is difficult to see how a man is deprived of property without due process of law by an ordinance which prevents the sale of his house for use as a residence by colored persons when he is not deprived of property without due process of law by an ordinance which prevents its sale for use as a saloon, garage, or livery stable.

The Supreme Court did not notice or even refer to the strong and well reasoned opinions of the State courts upholding segregation ordinances in *State v. Gurry*<sup>3</sup> and *Hopkins v. City of Richmond*,<sup>4</sup> and the only reference to the decision of the highest court of Kentucky upholding the very ordinance in question<sup>5</sup> was the statement: "The Court of Appeals of Kentucky, 165 Kentucky 559, held the ordinance valid and of itself a complete defense to the action."

The Baltimore ordinance materially differs from the Louisville ordinance. It forbids a white person from moving into a block where all the residents in the block are colored, and forbids a colored person from moving into a block where all the residents in the block are white, leaving all the blocks in which there are one or more white residents and also one or more colored residents open for the occupation by either white or colored persons. It thus leaves open for the residences of the colored people: (a) All blocks inhabited only by colored per-

<sup>1</sup> See *infra*.

<sup>2</sup> *Cusack v. Chicago*, 242 U. S. 526. (1916).

<sup>3</sup> 121 Md. 534, 88 Atl. 546, 47 L. R. A. (N. S.) 1087, Ann. Cas. 1915B, 957 (1913).

<sup>4</sup> 117 Va. 692, 86 S. E. 139 (1915).

<sup>5</sup> *Harris v. City of Louisville*, 165 Ky. 559, 177 S. W. 472 (1915).

sons; (b) all blocks inhabited by both white and colored persons; and (c) all blocks to be newly developed in which the first comer might be a colored person. It thus gives to the colored people a choice of habitation in the entire city and in any and every new development, excepting only blocks already improved and inhabited exclusively by white residents, and it leaves open for white residents the entire city and all new development, excepting only blocks already improved and inhabited exclusively by colored persons. It is also more certain and definite than the Louisville ordinance. It is easier to determine whether a block is inhabited only by white persons or only by colored persons than to determine whether a majority are white or colored in a block inhabited by both. Moreover, where the majority is the test, it may be changed. A block which is open to a colored resident today may not be open to him next week, and *vice versa*.

The opinion of the Supreme Court is disappointing in that it contains not a paragraph; not even a sentence; of discussion of the race question which has engaged the profound attention of thinkers and statesmen in cities of the north and west as well as the south. The only reference to this serious problem of our day is the following paragraph:

"That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges."

The opinion treats the case as involving nothing more important than a few dollars of difference between the price which the colored man Warley had agreed to pay the white man Buchanan for a certain house in Louisville and the price which some white man might have been willing to pay for the house if the decision of the Supreme Court of Kentucky had been upheld.

It is a striking illustration of the modern tendency to look upon property rights as more sacred than personal rights. The language of the Fourteenth Amendment, quoted in the opin-

ion, is, "That no State shall deprive any person of life, liberty or property, without due process of law." But the application and enforcement of that Amendment by the courts has been almost entirely to protect rights of property, and very rarely to protect rights of life or liberty. An age which witnesses increasing limitations upon the personal rights of individuals, for the public welfare; which sees the individual grow daily less and less, and the State grow greater and greater; which witnesses the upholding by the courts of a multitude of sumptuary and health laws and regulations restricting the personal liberty of the individual for the public good; also witnesses a growing tendency on the part of the courts to strike down laws and ordinances where it is claimed that they affect property rights. There is justification for the complaint which Bryan sums up in the sentence that he is opposed to "putting the dollar above the man."

The opinion, by inference at least, justifies laws which infringe upon the personal liberty of the colored man, which prohibit him from riding in the same passenger car with white people or having his children educated in the same school with white children, solely on account of his color. He is not prohibited from riding in the car with white people because he is dirty or disorderly or diseased or dangerous, for no colored person can ride in a white coach, no matter how intelligent or refined or cultivated, and the Supreme Court *has said* that the law which prohibits colored persons from riding in the same coach with white people, solely on account of their color, is valid, but *now says* that this ordinance is invalid because it prohibits a black man from buying a house for his residence in a white block, and prohibits a white man from selling the house to the black man, solely on account of his color.

The enforcement of the law which requires separation of the races in passenger trains is necessarily attended with a degree of mortification to the negro, which does not apply to a segregation ordinance which forbids a negro to purchase and live in a house in a white block. Whenever the colored man wants to travel he must go into a separate waiting room, and ride in a separate coach, under the observation of a multitude of peo-

ple. In a passenger train it frequently happens that a colored passenger does not know which is the white and which is the colored coach and goes into the white coach, and the conductor comes along and orders him, and if necessary, forces him, to get out of the white coach and go into the coach assigned to colored people. Nothing like this would occur under a segregation ordinance. The segregation ordinance does not go to a colored man who is living in a block and say to him, "You must get out and move somewhere else." It is a purely preventive measure and its execution in Baltimore, where it has been enforced and has worked admirably for four years, has not been attended with any circumstances of mortification to the black man, or any breach of the peace or disorder of any kind. The Supreme Court has said that the black man's personal liberty may be interfered with; he may be subjected to humiliation by ordering him out of a white car and throwing him out if he does not go, solely because he is black; but now says that the right to dispose of property cannot be interfered with by limiting the use of it for residence purposes by the purchaser to white people, if the house is in a white block, or to colored people if the house is in a colored block. This property right must be upheld, even though it is not certain that any damage would result to the individual from the enforcement of the ordinance, and it is certain that great damage would result to the neighborhood from the nullification of the ordinance.

It is not at all certain that Buchanan could not have gotten just as much from a white man. There is no certainty in any case that a negro will give more for a house in a white block than a white man would give for it; but there is certainty in every case that where a negro buys and moves into a house in a white block immediate and substantial damage results to all the other owners of property in that block, because every other house in that block immediately becomes less desirable and less valuable to white persons, and the number of white purchasers for property is so many times greater than the number of colored persons. One man who sells a house in a white block to a negro, because possibly he gets \$50 or \$100 or \$500 more from the negro than his property is worth, because the negro

is willing to pay a premium to get next door to white people, immediately limits the possible purchasers of the other houses in the block and depreciates the value of every other house in the block.

Considered from the standpoint of property rights, it is not certain that upholding the ordinance would have materially injured a single individual, while it is certain that nullifying the ordinance will work material injury to entire blocks.

The opinion is alarming in that it possibly jeopardizes the laws requiring separate coaches for white passengers, and, what is more important, separate schools for white children.

The Court says:

“As we have seen, this court has held laws valid which separated the races on the basis of equal accommodations in public conveyances, and courts of high authority have held enactments lawful which provide for separation in the public schools of white and colored pupils where equal privileges are given. But in view of the rights secured by the Fourteenth Amendment to the Federal Constitution such legislation must have its limitations, and cannot be sustained where the exercise of authority exceeds the restraints of the Constitution.”

But the Court does not say that it now approves the decision with regard to separate coaches and separate schools. Nor does the Court attempt to make any distinction between the cases upholding separate schools and the decision of the Court of Appeals of Kentucky upholding this segregation ordinance.

Referring to its own prior decision upholding the separate coach law, the Supreme Court says:

“The defendant in error insists that *Plessy v. Ferguson*, 163 U. S. 537, is controlling in principle in favor of the judgment of the court below. In that case this court held that a provision of a statute of Louisiana requiring railway companies carrying passengers to provide in their coaches equal but separate accommodations for the white and colored races did not run counter to the provisions of the Fourteenth Amendment. It is to be observed that in that case there was no attempt to deprive persons of color of transportation in the coaches of the public carrier, and the

express requirements were for equal though separate accommodations for the white and colored races. In *Plessy v. Ferguson*, classification of accommodation was permitted upon the basis of equality for both races."

It would seem that this statement shows no distinction between a law requiring white and black to travel in separate coaches and a law requiring white and black to live in separate blocks.

The segregation ordinance does not prevent white and colored people from living in the same city and the same ward and the same section, but only from living in the same block; nor does it prevent colored persons from living in houses in every respect as comfortable as the houses of white persons.

The reasons which sustain laws providing for separate schools and separate coaches or compartments on railway trains apply, with added force, to a *bona fide* effort to separate the residences of white and black. People travel on railway trains only occasionally—they live in their homes all the time. If the feeling against close contact justifies a law which will separate the races on railroad trains, where they meet only occasionally and for a short time, does not the same reason apply to a law which attempts to separate the races as to their residences, and so avoid their meeting all the time and every day, as they necessarily go in and out their front doors?

If considerations of peace and good order justify the separation of the races in coaches; if there is sufficient danger of clashes between the races from meeting occasionally and for a short time in railway coaches, is there not far greater danger of clashes between the races from families, white and black, living side by side, with their front doors within a few feet of each other every day? If the natural feeling between the races, or the danger of conflict between children is sufficient justification for separate schools, where the children would be brought into contact only a part of the time and under the supervision of teachers who could maintain order, do not the same reasons apply with greater force to a measure which is intended to prevent the children from meeting in daily contact in front of their homes, and much of the time without any older person

present to maintain order? Of course, children might fight without any detriment perhaps to the public, but here again human nature must be reckoned with, for if the white and black children get into fights the respective parents are very apt to be drawn into the quarrels of the children.

The reason which sustains laws against intermarriage and the laws making sexual intercourse between black and white, crime, is to prevent cross-breeding between the races. This same reason sustains provisions for preventing black and white children growing up side by side with front door steps either adjoining or within a few feet of each other.

The ordinance forbidding a white man to move into a colored block and forbidding a colored man to move into a white block applies, without discrimination, to both races. The contention that, while this is true as to the terms of the ordinance, the ordinance is really aimed at the colored man, because the white man will not want to move into a colored block, amounts to this: *That a law may be said to be invalid because it only operates on those who want to violate it.* Moreover, the same contention could be made, and with certainly equal force, against the laws which require separation of the races in railroad trains and in schools. It might be said that, while these laws apply without discrimination to both races, they are aimed at the negro; that their purpose is to keep the negro out of white schools and out of the white compartments on trains. The same contention might be made against the law which forbids intermarriage between the races; it might be said that the real purpose of it is to protect the integrity of the white race. Why is a law or ordinance forbidding the erection and maintenance of a garage in a residence block, without the consent of a majority of the property owners therein, a valid exercise of the police power? It cannot be said that a garage in a residence block would materially affect the health or safety of the residents in that block, and some people do not object to garages—they rather like the smell of the gasoline and the noise and bustle of a garage. But the majority of people do object to garages near their residences. *The maintenance of a garage in a residence block offends the prevailing sentiment of the community, and,*

*therefore, affects the comfort of the residents of the block and diminishes the value of their property; and for these reasons a law forbidding a garage in a residence block is a valid exercise of the police power. For precisely the same reason, because the residence of a negro in a white block offends the general sense of the community and thereby tends to the discomfort of the white residents in the block and diminishes the value of their property, a reasonable segregation ordinance is a valid exercise of the police power. Moreover, the segregation ordinance may be truly said to have a real relation to the public peace and the public morals—which could not be said of a garage.*

If it be said that the ordinance does not apply without discrimination to both races, because it does not apply to both races *in regard to the same place*; but forbids a white man to live at one place (in a colored block), and forbids a colored man to live at a different place (in a white block); the same thing can be said of the laws providing for separate schools and separate railway coaches. They do not apply to *both* races as to the *same school or car*; but a white child is forbidden to attend *one* school (a colored school) and a colored child is forbidden to attend *another* school (a white school); and similarly as to the railway cars.

On the question whether or not the Louisville ordinance is a reasonable exercise of the police power granted by the legislature to the city council, the decision of the city council, itself, upheld by the highest court of the State is of great weight.

In *Cusack v. Chicago*,<sup>6</sup> the Supreme Court says:

“We, therefore, content ourselves with saying that while this Court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them, and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the state whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and

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<sup>6</sup> *Supra*.

palpable that it has no real or substantial relation to the public health, safety, morals or to the general welfare."

If the City Council of Louisville "in determining the question of reasonableness" was "at liberty to act with reference to the established usages, customs and traditions of the people;"<sup>7</sup> if the police power "may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare;"<sup>8</sup> if "tradition and the habits of the community count for more than logic;"<sup>9</sup> if "regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate cannot be said to be unreasonable;"<sup>10</sup> then it would seem that the Louisville ordinance could not be said to be unreasonable.

*S. S. Field.*

CITY SOLICITOR OF BALTIMORE.

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<sup>7</sup> *Plessy v. Ferguson*, 163 U. S. 537, 550 (1896).

<sup>8</sup> *Noble State Bank v. Haskell*, 219 U. S. 104, 111 (1911).

<sup>9</sup> *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 366 (1910).

<sup>10</sup> *Chiles v. Chesapeake & Ohio Ry.*, 218 U. S. 71, 77 (1910).